No. 08-1068



# In The Supreme Court of the United States

JOANNE GAGLIANO,

*Petitioner,*

v.

RELIANCE STANDARD LIFE INS. CO.,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## REPLY BRIEF OF PETITIONER

Robert E. Hoskins
FOSTER LAW FIRM, LLP
601 East McBee Avenue
Suite 104
Greenville, South Carolina 29602
(864) 242-6200

Peter K. Stris
*Counsel of Record*
Brendan S. Maher
STRIS & MAHER
1920 Abrams Parkway
Suite 430
Dallas, Texas 75214
(214) 224-0091

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## TABLE OF CONTENTS

**Page**

## TABLE OF CITED AUTHORITIES

**Page(s)**

### CASES

**STATUTE**

## REPLY BRIEF FOR THE PETITIONER

On February 17, 2009, a petition for a writ of certiorari was filed in this case. On March 23, 2009, this Court called for a response. As explained herein, the opposition filed by respondent does not seriously challenge the validity of the reasons for granting the writ set forth in the petition. It is beyond dispute that the circuits are divided over the question presented; the question is extremely important, and immediate review is needed. As such, petitioner respectfully requests that the Court grant the petition or, in the alternative, call for the views of the Solicitor General.

## I. THERE IS A SQUARE CIRCUIT SPLIT OVER THE QUESTION PRESENTED

1. The question presented in this case presumes three things: (1) an ERISA welfare plan approved a claim for benefits, (2) the plan thereafter decided to terminate the payment of such benefits, and (3) a court has determined that the termination was in violation of the procedures required by 29 U.S.C. § 1133 and applicable regulations. This case presents a paradigmatic example. Petitioner's claim for long term disability benefits was approved by respondent. Pet. 5 (citing Pet. App. 49a). Thereafter, respondent decided to terminate the payment of such benefits. Pet. 6 (citing Pet. App. 59a). And, ultimately, the Fourth Circuit held that respondent's termination of benefits was in violation of the procedures required by 29 U.S.C. § 1133 and regulations promulgated thereunder. Pet. 8 (citing Pet. App. 15a).

As the Fourth Circuit expressly acknowledged, it created a split with its sister circuits who, under such circumstances, have held that ERISA permits the judicial reinstatement of disputed benefits until they are terminated by the plan in compliance with the statute's required procedures. Pet. 10 (quoting Pet. App. 22a). Unlike the Fourth Circuit, the Third, Sixth, Seventh, and Ninth Circuits have each held that ERISA permits, at a minimum, such reinstatement in order to preserve the status quo "until a decision regarding the potential revocation of * * * benefits has been properly determined in compliance with the plan's provisions." Pet. 11 (quoting *Wenner v. Sun Life Assurance Co.*, 482 F.3d 878, 883 (CA6 2007); *see also* Pet. 10-13 (discussing *Wenner*, *Schneider v. Sentry Group Long Term Disability Plan*, 422 F.3d 621 (CA7 2005); *Grossmuller v. Int'l. Union et al.*, 715 F.2d 853 (CA3 1983), and *Pannebecker v. Liberty Life Assurance Co.*, 542 F.3d 1213, 1221 (CA9 2008).[1]

2. Before this Court, respondent takes the untenable position that "[t]here is no split in the circuits on this subject." BIO 1. In support of this position, respondent advances two arguments. First, respondent argues that "the facts in this case are unique" and, therefore, concludes that the Fourth Circuit decided a different question than the one decided by the Third, Sixth, Seventh, and Ninth

[1] As explained in the petition, the Ninth Circuit appears to go even further and permit a claimant to recover benefits for the period between a plan's procedurally improper denial and a procedurally proper denial *even if* the court ultimately agrees with the plan fiduciary that the claimant was never substantively entitled to the disputed benefits under the terms of the plan. *See* Pet. 15 n.20 and accompanying text.

Circuits. BIO 2-7. Second, respondent contends that the Third, Sixth, Seventh, and Ninth Circuits do not always permit the reinstatement of benefits in cases in which the question presented is at issue. BIO 7-11. As explained below, each of these two arguments is frivolous.

a. Respondent first argues that the issue decided by the Fourth Circuit is somehow different from the issue decided by the Third, Sixth, Seventh, and Ninth Circuits. BIO 2-7. Specifically, respondent argues that "the facts in this case are unique" because "petitioner is relying on a procedural irregularity to continue to receive benefits that were improperly awarded and that she was never entitled to receive under the plain language in the Plan." BIO 2. Put simply, respondent's argument is frivolous because it conflates respondent's *litigation position* (*i.e.*, that petitioner "was never entitled to receive [benefits]") with a *judicial determination*.

As explained in the petition, "the court of appeals made clear that the substantive question of whether petitioner qualified for benefits under the Plan was *not* before the court" *because of the very procedural violations committed by respondent*. Pet. 8. In the words of the Fourth Circuit:

> Even though [respondent] argues [ ] that the record proves the Pre-Existing Conditions Limitation applies, and thus we should enter judgment for [it], this argument is, at best, premature. Due to the failure of [respondent] to comply with ERISA notice

> requirements, [petitioner] was denied her right to make an administrative record on the Pre-Existing Conditions Limitation issue as well as other rights set forth in 29 C.F.R. 2560-503-1(h).

Pet. 8-9 (quoting Pet. App. 21a). Respondent's argument and, in fact, its entire opposition, is predicated on acceptance of its *unresolved* litigation position that petitioner was never entitled to receive benefits. *See, e.g.*, BIO 11-12 (repeatedly citing documents from the joint appendix of the Fourth Circuit in support of disputed factual claims that were never addressed by the court of appeals).

b. Second, respondent argues that there is no circuit split because "The Third, Sixth, Seventh and Ninth Circuits Have Also Remanded Claims When Appropriate." BIO 7. Again, respondent's argument is frivolous. None of the cases it cites, in any way cast doubt over the square circuit split regarding the question presented.

*Third Circuit.* Respondent cites *Syed v. Hercules, Inc.*, 214 F.3d 155 (CA3 2000) for the proposition that "the Third Circuit has not always concluded that reinstatement of benefits is the proper remedy when a plan fails to provide a full and fair review." BIO 7. Even a cursory review of that decision, however, reveals that the case did not involve the question presented. The Third Circuit did not even reach the issue of what remedy is appropriate for a procedural violation of 29 U.S.C. § 1133 because the court held that no such violation had occurred. *Syed*, 214 F.3d at 163 (affirming the grant of summary

judgment dismissing Syed's claim under 29 U.S.C. § 1133 after finding that the ERISA plan administrator "fully complied with the statutory and regulatory requirements for notice under ERISA § 503, and [that] Syed ha[d] not raised any genuine issue of material fact to the contrary.").

*Sixth Circuit.* Respondent cites *McCartha v. National City Corp.*, 419 F.3d 437 (CA6 2005) for the proposition that, even in the Sixth Circuit, "a procedural violation does not require a substantive remedy." BIO 8 (quoting *McCartha*, 419 F.3d at 447). *McCartha*, however, is perfectly consistent with the Sixth Circuit's decision in *Wenner*. Although the *McCartha* court found a violation of 29 U.S.C. § 1133, it did not reinstate benefits (but rather affirmed the district court's judgment on the administrative record dismissing plaintiff's claim) because it *also* reached the merits of the dispute and determined that the claimant was not substantively entitled to benefits. 710 F.2d at 393. Put simply, *McCartha* only serves to reinforce the existence, depth, and importance of the circuit split.[2]

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[2] To be clear: *McCartha* confirms, as intimated in the petition, that there is a 3-way circuit split over the question presented. The Fourth Circuit does not permit reinstatement of benefits terminated in a procedurally improper fashion unless the termination of benefits "was an abuse of discretion as a matter of law" (*i.e.*, the court determines that the claimant is *substantively* entitled to benefits). *Gagliano*, 547 F.3d at 240. The Sixth Circuit permits reinstatement of benefits terminated in a procedurally improper fashion unless the termination of benefits was substantively proper as a matter of law (*i.e.*, the court determines that the claimant is *not* substantively entitled to benefits). *Wenner*, 482 F.3d at 883. And the Ninth Circuit permits reinstatement of benefits terminated in a procedurally improper fashion *even if* the

*Seventh Circuit.* Respondent cites *Wolfe v. J.C. Penney Co.*, 710 F.2d 388 (CA7 1983) and *Quinn v. Blue Cross and Blue Shield*, 161 F.3d 472 (CA7 1998) for the proposition that "[a]warding retroactive benefits is not always the proper remedy * * * *" BIO 9. As with the Third Circuit case cited by respondent, even a cursory review of these two Seventh Circuit decisions reveal that they did not involve the question presented. Put simply, neither case involved a *termination* of benefits that would have continued absent the procedural violation. *Wolfe* involved an *initial* denial of a claim for long term disability benefits and *not* a termination of a previously granted claim.[3] *Wolfe*, 710 F.2d at 388. And *Quinn* expressly notes that it is different from *Grossmuller* (the relevant Third Circuit case) and

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denial of benefits was substantively proper as a matter of law. *Pannebecker*, 542 F.3d at 1221. The Third and Seventh Circuits have rejected the position taken by the Fourth Circuit and, at a minimum, embraced the position taken by the Sixth Circuit. *Grossmuller*, 715 F.2d at 852 and *Schneider*, 422 F.3d at 621.

[3] "[] the distinction is important. A plaintiff denied any benefits at all has no expectation of receiving them unless her claim is meritorious, and thus returning her to the status quo prior to the § 1133 violation requires only curing the procedural violation so that she may fairly pursue the merits of her claim. On the other hand, a plaintiff whose benefits have been terminated has, prior to the termination, a full expectation of continued disability payments until they are terminated by lawful procedures. Thus, "prior to the termination of her benefits by improper procedures, the status quo was that [the plaintiff] was receiving long-term disability benefits" and "the appropriate remedy is an order vacating the termination of her benefits and directing [the defendant] to reinstate retroactively the benefits." *See Schneider*, 422 F.3d at 629-30." *Wenner*, 482 F.3d at 883, 884.

*Halpin v. W.W. Grainger Inc.*, 962 F.2d 685 (CA7 1992) (the original Seventh Circuit case relied on in *Schneider)* because "[u]nlike *Halpin* and *Grossmuller*, Quinn was not scheduled to continue receiving benefits under the Program." *Quinn*, 161 F.3d at 478.

*Ninth Circuit.* Respondent cites *Saffle v. Sierra Pacific Power Co.*, 85 F.3d 455, 461 (CA9 1996) and *Chuck v. Hewlett Packard Co.*, 455 F.3d 1026 (CA9 2006) for the proposition that "the Ninth Circuit has ordered a remand rather than reinstatement of benefits." BIO 10. Again, these cases obviously do not involve the question presented. *Saffle* involved an *initial* denial of a claim for long term disability benefits and *not* a termination of a previously granted claim. *Saffle*, 85 F.3d at 461. And *Chuck* is a retirement plan case in which the violation of 29 U.S.C. 1133 was relevant only for purposes of determining the application of the statute of limitations. *Chuck*, 455 F.3d at 1026.

## II. RESPONDENT DOES NOT SERIOUSLY DISPUTE THAT THE QUESTION IS OF EXTRAORDINARY IMPORTANCE

Unsurprisingly, respondent fails to meaningfully dispute that the question presented is frequently recurring and exceptionally important. In fact, the extraordinary importance of the question is evidenced by respondent's conspicuous failure to contest the following empirical claims made in the petition:

- "Millions of Americans are covered by employer-sponsored disability insurance." Pet. 13 (citations omitted).

- "[M]illions of Americans have welfare benefit claims denied each year." Pet. 2 (citations omitted).

- "Because disability claims are often wrongfully denied or terminated, the question presented affects an extraordinary number of potential claimants." Pet. 14 (citation omitted).

With regard to plan fiduciaries, respondent concedes that the question presented is of exceptional importance. As noted in the petition, "the question presented is [ ] of extraordinary importance to fiduciaries [because h]aving to continue paying improperly granted—or no longer owed—disability benefits during the pendency of the administrative process means that fiduciaries will be forced to rely on recoupment provisions * * * in order to recover monies received by claimants to which there was no legitimate entitlement." Pet. 15. Respondent appears to agree with this contention. BIO 6 n.3 ("Although a plan may include language permitting the recovery of erroneously paid benefits, the bigger issue tends to be the participant's dissipation of those funds before a judgment is entered.").

With regard to claimants, respondent half-heartedly disputes the importance of the question presented by asserting in passing that "if [a] claim is

remanded and the participant ultimately proves eligibility for benefits, there is no harm by the delay in payment [because] as petitioner recognizes, a court can award pre-judgment interest." BIO 6-7 n.3. As noted in the petition, however, "disability benefit claimants are often unable to work." Pet. 14 (citation omitted). And "[b]eing able to eventually recover back payments with interest is hardly comforting to those individuals who are completely reliant on continued benefits in order to pay for basic living expenses." Pet. 14-15. Tellingly, respondent does not even attempt to respond to this argument.

## III. RESPONDENT DOES NOT SERIOUSLY DISPUTE THAT IMMEDIATE REVIEW IS NEEDED

In the petition, two arguments are advanced in support of the proposition that immediate review of the question presented is needed. First, petitioner argued that "there is a strong need for national uniformity regarding the question presented given its importance and the underlying purpose of ERISA." Pet. 16. Second, petitioner argued that "further percolation is likely to proceed slowly while yielding little—if any—benefit." Pet. 17. Tellingly, respondent fails to address—let alone dispute—either of these contentions.

Instead, respondent contends that "this [*sic*] not the appropriate case to resolve the issue." BIO 11. Rather than advance some argument regarding the appropriateness of this case as a vehicle for resolution of the question presented, however, respondent merely cites several disputed facts from

the joint appendix filed in the court of appeals.[4] As explained above, these facts have absolutely no legal significance.

[4] Inexplicably, respondent also cites Pet. App. 27a for the proposition that "claimant [ ] provided inaccurate information regarding her medical history to the Plan on a pre-existing conditions questionnaire." BIO 11 (citing Pet. App. 27a). Of course, the Fourth Circuit opinion cited by respondent says no such thing. To the contrary, it states that "[a]lthough it is unclear from the record whether Gagliano herself filled out the form titled 'Pre-Existing Condition Questionnaire' or whether a Reliance employee helped her, it is clear that the questionnaire was timely filed, and it included information about Gagliano's treatment at the Loudoun Hospital Center." Pet. App. 27a.

## CONCLUSION

For all the reasons discussed above and in the petition, immediate guidance is needed from this Court regarding the proper resolution of the question presented. As such, petitioner respectfully requests that the Court grant the petition or, in the alternative, call for the views of the Solicitor General.

Respectfully submitted,

/s/ _____

ROBERT E. HOSKINS
FOSTER LAW FIRM, LLP
601 E. McBee Ave.
Suite 104
Greenville, SC 29602
(864) 242-6200

PETER K. STRIS
*Counsel of Record*
BRENDAN S. MAHER
STRIS & MAHER LLP
1920 Abrams Pkwy, #430
Dallas, TX 75214
(214) 224-0091

KARL WILLIAM PILGER,
BORING & PILGER, P.C.
307 Maple Ave. W.; Ste. D
Vienna, VA 22180
(703) 281-2161

SHAUN P. MARTIN
UNIVERSITY OF SAN DIEGO
SCHOOL OF LAW
5998 Alcalá Park
San Diego, CA 92110
(619) 260-2347

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